

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

**T-SCAN CORPORATION**, a Washington  
Corporation,

Plaintiffs,

vs.

**BPA TECHNOLOGIES, INC.**, a California  
Corporation; and **ALFRESCO SOFTWARE  
AMERICAS, INC.**, a Delaware Corporation,  
Defendants.

**Case No.: 2:11-cv-00255**

**PLAINTIFF'S TRIAL MEMORANDUM**

TRIAL DATE:  
September 12, 2011

This action for breach of contract arose as a result of BPA Technologies failure to produce properly functioning software as specifically contracted by T-Scan Corporation. T-Scan Corporation is a local litigation support company, providing document retrieval, production, and management services to law firms and insurance companies. In order to provide more efficient and economical services to its clients, and to maintain consistency with market expectations, T-Scan Corporation retained BPA Technologies to produce functioning software to enable T-Scan clients to have secure access to documents retained in a secure on-line repository, among other functionality. BPA Technologies promised, through multiple proposal iterations, to be able to

1 produce the requested functioning software. After over eighteen (18) months, which included  
2 numerous problems with the developing software, functioning software had yet to be produced.  
3 Thus, in December 2009, T-Scan Corporation terminated the relationship with BPA  
4 Technologies.

5 By the time that T-Scan terminated the relationship with BPA Technologies, T-Scan had  
6 incurred substantial costs, including monies paid to train BPA employees with regard to T-  
7 Scan's business and T-Scan's employees time in such training, and monies paid to T-Scan  
8 employees to test daily the code written by BPA Technologies. Further, upon BPA's direction,  
9 T-Scan moved over its entire database to an Alfresco software platform, which was serving as  
10 the base for BPA's software project. The transfer of T-Scan's databases to Alfresco's production  
11 environment caused a significant amount of manual work on behalf of T-Scan employees in  
12 order to maintain full functionality for T-Scan's clients. This manual work was to be automated  
13 upon BPA's software implementation within ninety (90) days after transfer to the Alfresco  
14 platform. Nearly a year later, when T-Scan terminated the relationship with BPA, the automated  
15 processes had yet to be developed. In fact, as of the date of this trial, T-Scan is still incurring  
16 significant costs in performing the manual tasks while working towards a new software solution.  
17 These damages are significant to T-Scan.

18 Evidence at trial will establish that BPA breached the contract with T-Scan by failing to  
19 deliver functioning software as promised by failing to have met established deadlines for the  
20 production of properly functioning software. In addition, evidence at trial will establish that  
21 BPA's breach proximately caused significant damages to T-Scan.

## 22 I. LEGAL CONTENTIONS

23 T-Scan will pursue at trial compensatory damages from Defendant BPA Technologies,  
24 Inc. ("BPA") for 1) breach of contract for failure to deliver software goods as agreed, and 2)  
25 breach of contract for failure to deliver software goods on dates and times expressly stated and  
26 set by Defendant BPA.

1 T-Scan will pursue at trial the following affirmative defenses: lack of duty based failure  
2 of performance.

3 1. Defendant's Claims and Defenses:

4 BPA will pursue at trial the following affirmative defenses: prevention of performance,  
5 set-off, failure to mitigate damages, and unjust enrichment.

6 BPA will pursue the following claims: breach of contract and breach of the covenant of  
7 good faith and fair dealing.

8 **II. FACTUAL CONTENTIONS**

9 **The parties stipulate to the following facts:**

10 1. Plaintiff T-Scan is a business that provides litigation support services and  
11 medical, legal and insurance records storage and retrieval.

12 2. In early 2008, T-Scan determined that if it created a Web-based interface to its  
13 records storage database, the enhanced service would allow its existing customers to have ready  
14 access to their records stored on T-Scan's computers, and would allow T-Scan to attract new  
15 customers to subscribe to T-Scan's offerings.

16 3. T-Scan learned of Alfresco's open-source records storage and retrieval software  
17 ("Content Manager") and contacted Alfresco for the purpose of licensing the Alfresco Content  
18 Manager.

19 4. After speaking with the Alfresco representative, T-Scan learned that the Content  
20 Manager would not serve all of T-Scan's needs, but being open-source software, it could easily  
21 be modified to serve T-Scan's needs.

22 5. Alfresco has a "Partner Network Program" ("PNP") wherein it collaborates with  
23 other businesses who provide value-added services to further expand Alfresco's customer base.

24 6. The PNP is designed to provide partner organizations with the expertise to  
25 market, configure, customize and implement Alfresco solutions for customers worldwide.  
26

1           7.       Alfresco works with different categories of partners including those it categorizes  
2 as “System Integrators.”

3           8.       According to Alfresco’s Web site, “System Integrators provide expertise  
4 consulting, integration and migration services for Alfresco content management solutions. All  
5 System Integrators have trained and certified Alfresco consultants on staff.”

6           9.       Alfresco informed T-Scan that BPA is a member of Alfresco’s Partner Network  
7 Program and referred T-Scan to BPA.

8           10.      T-Scan contracted with BPA to acquire the software solution they needed to  
9 provide the new offerings it wished to make.

10          11.      On August 8, 2008, BPA submitted a proposal (“August Proposal”), which  
11 T-Scan’s Information Technology Manager, Andre Nieuwendam, signed two days later.

12          12.      BPA informed T-Scan that none of the work that had been done under the August  
13 Proposal could be salvaged for the Liferay-based project.

14          13.      Between August 2008 and January 2009, the parties negotiated the details of the  
15 new development which was to include Liferay Portal.

16          14.      On December 30, 2008, BPA submitted a revised proposal for the work to be  
17 done in the Liferay project (“Liferay Proposal”).

18          15.      The Liferay Proposal states, “BPA estimates that this project will take 31 weeks  
19 elapsed time...”

20          16.      The Liferay Proposal is a deliverables-based contract.

21          17.      T-Scan did not sign the Liferay Proposal until January 29, 2009, thirty days after  
22 the date indicated in the Liferay Proposal as the start date of the development.

23          18.      Development under the Liferay Proposal continued until December 15, 2009,  
24 when T-Scan cut off BPA’s access to T-Scan’s computers and servers.

25          19.      On February 24, 2010, by and through the law offices of The Chugh Firm, BPA  
26 sent T-Scan a demand for \$101,631 for alleged services rendered that remain unpaid. In the

1 demand letter, BPA generally alleges that these fees are a result of “changes in scope” of the  
2 original project.

3 20. T-Scan has made no payments to BPA for the development work provided by  
4 BPA under the Liferay Agreement.

5 **T-Scan Corporation further contends:**

6 1. T-Scan invests significant time, effort and money in enhancing its offerings in  
7 order to stay ahead of its competition in this very competitive business.

8 2. The Liferay Proposal includes dates by which BPA would complete certain  
9 deliverables, and it indicates that the development would be completed by April 10, 2009.

10 3. T-Scan interpreted the Liferay Proposal timeline to mean that the 31-week  
11 schedule included in that proposal would commence once T-Scan accepted the proposal.

12 4. While some dates in the Liferay Proposal may have changed nominally, at no  
13 time after January 29, 2009 did T-Scan ever agree with BPA to alter the 31-week timeline  
14 provided by BPA in the Liferay Proposal.

15 5. Prior to the Liferay Proposal, BPA was fully trained regarding T-Scan business  
16 and required tasks and functionality of the software to be developed.

17 6. There were no material changes to the required tasks and functionality of the  
18 software to be developed by BPA after the Liferay Proposal was accepted.

19 7. There are no monies owing from T-SCAN to BPA due to the fact that the  
20 December 30, 2008 agreement (the Liferay Proposal) is a “deliverable-goods” agreement and  
21 BPA has not delivered the goods they promised.

22 8. Between August 2008 and December 2009, on an almost daily basis, T-Scan gave  
23 BPA a great deal of feedback on the scores of deficiencies in the numerous versions of the  
24 software delivered to T-Scan by BPA.

25 9. Between August 2008 and December 2009, T-Scan made representation to  
26 existing and prospective clients regarding the functionality promised by BPA.

1           10.     After terminating BPA's access to T-Scan computers, T-Scan sought the services  
2 of a company called Reva Solutions, but was thwarted in its efforts by Alfresco.

3           11.     BPA has not delivered a single useable piece of software to T-Scan.

4           12.     The software provided to T-Scan by BPA is of no value to T-Scan.

5           13.     Subsequent to ending its relationship with BPA, T-Scan has gone through  
6 extensive efforts to utilize the Alfresco software implemented by BPA by attempting to locate an  
7 Alfresco trained engineer that could perform the necessary modifications. While the  
8 modifications possible to be completed, Alfresco has thwarted any trained engineer from  
9 performing the modifications without substantial payment to Alfresco.

10          14.     T-Scan has, after extensive failed negotiations with Alfresco, contracted with a  
11 third party vendor to utilize a Microsoft product for its purposes, a process which is still on-  
12 going.

13          15.     T-Scan incurred substantial employee costs in training BPA with regard to T-  
14 Scan's business and T-Scan's requirements for properly implemented software.

15          16.     Upon BPA's recommendation and promise to have properly functioning software  
16 in place within ninety (90) days, T-Scan transferred all of its data to the production environment  
17 of Alfresco, the base of BPA's software modifications.

18          17.     The transfer of T-Scan data to the Alfresco production environment has caused T-  
19 Scan to incur further employee costs in performing certain tasks manually, which was to have  
20 been performed automatically by the software modifications, including email notifications to  
21 clients. But for the use of Alfresco production environment and BPA's failure to produce  
22 properly functioning software, T-Scan would not have incurred these extra costs and expenses.

23          18.     The software product T-Scan contracted BPA to produce was to resolve several  
24 manual tasks as automated features in the software, including client research, creating client  
25 record collection packets, and client invoicing. Had BPA produced properly functioning  
26 software, T-Scan would have been relieved of employee costs for these tasks.

**III. STATEMENT OF ISSUES**

1. Whether BPA breached the Liferay Agreement by failing to meet deadlines for completion of performance, thereby requiring T-Scan to continue with a manual process
2. Whether T-Scan breached the Liferay Agreement by terminating BPA's access to T-Scan's computers and servers, thereby preventing BPA from completing development.

**IV. EVIDENTIARY ISSUES**

It appears that the main evidentiary issues at trial will be regarding Defendant BPA's objection to evidence pertaining to employee hours and records pertaining to deficiencies discovered in BPA's software code.

Defendant BPA demands that documentation have been provided pertaining to employee hours. However, T-Scan did not operate in business by keeping such hourly records. Rather, evidence pertaining to dedicated employee hours will be presented through the testimony of T-Scan's in-house accountant. The Court should permit the testimony of the T-Scan employee that has actual knowledge of employee time allocation, regardless of whether documentation exists.

Defendant BPA objects to the introduction of evidence pertaining to deficiencies in BPA's software because they were disclosed in May 2011. T-Scan found these documents in May 2011 and disclosed the immediately. However, BPA's objection to late disclosure is disingenuous because the deficiency reports had been sent to BPA by a T-Scan employee during the time that BPA was writing software code for T-Scan. Thus, BPA has had possession and knowledge of these reports since well before the inception of litigation, and throughout the litigation. The Court should permit the deficiency reports to be admitted at trial.

## V. REQUESTED RELIEF

T-Scan Corporation requests recovery of compensatory damages incurred as a direct result of BPA Technologies Breach of the Liferay Agreement. Theses damages are as follows:

T-Scan Employee Time Spent on BPA Project	\$117,586
T-Scan Employee Time Spent Manually Creating Client Packets and Research, Which Was to Be Relieved if BPA Produced Properly Functioning Software	\$188,800
T-Scan Employee Time Spent Manually Sending Client Email Notifications, Necessary as a Result of BPA Use of Alfresco Production Environment But Failure to Deliver Functioning Software	\$75,668
T-Scan Employee Time Spent Manually Invoicing Clients, Which Was to Be Relieved if BPA Produced Properly Functioning Software	\$121,703
Costs incurred by T-Scan in training and educating BPA.	\$79,000
<b>TOTAL</b>	<b>\$582,757</b>

## VII. CONCLUSION

Based upon the statements of law and facts contained herein, and upon the evidence which will be presented at trial, Plaintiff T-Scan Corporation will be asking the Jury and this Court to render a verdict in favor of T-Scan Corporation finding BPA Technologies to have breached the Liferay Agreement, can caused T-Scan Corporation damages in the amount of \$582,757.

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2 RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of September 2011.  
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5 FREEMAN LAW FIRM, INC.  
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